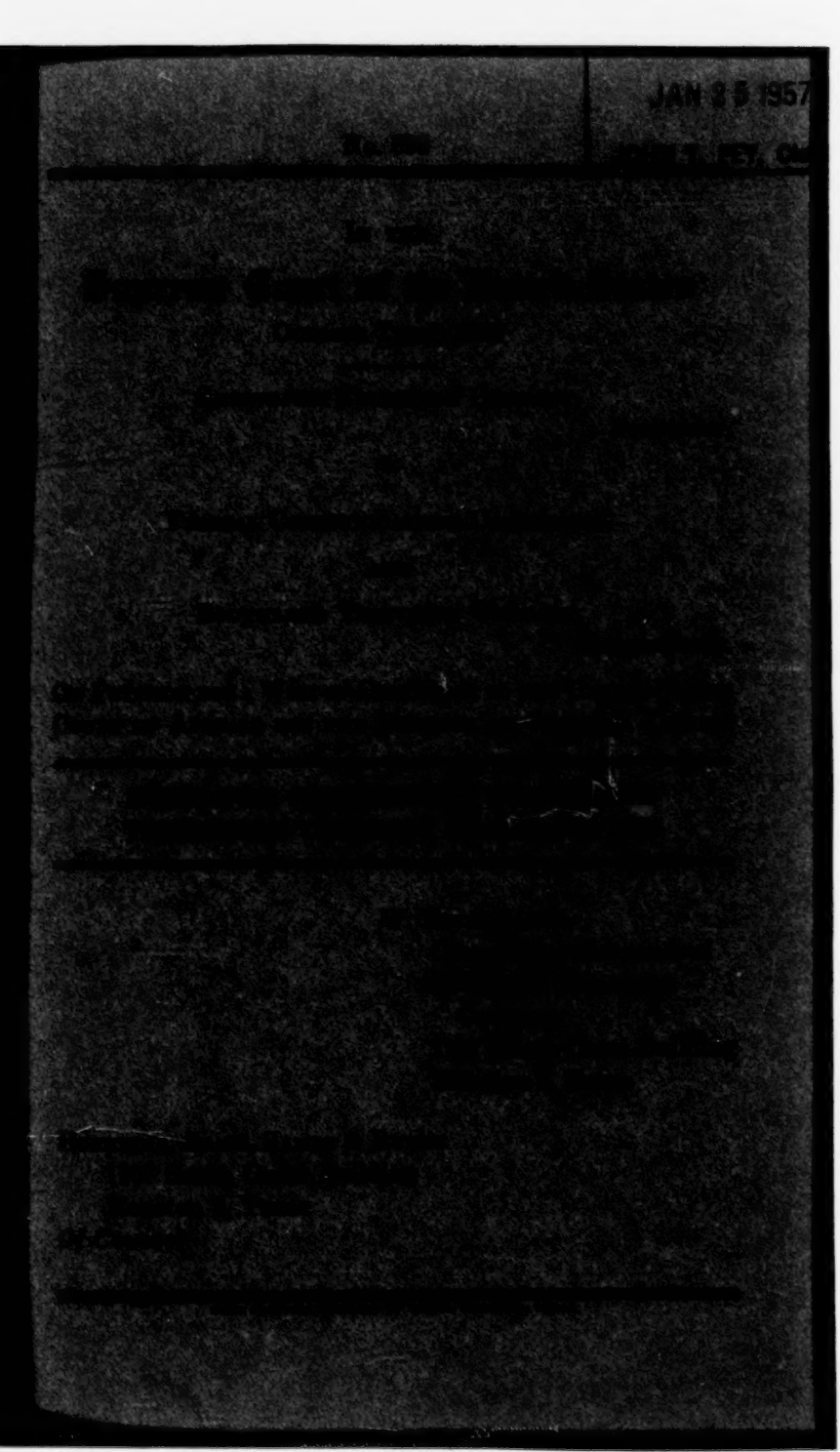

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	1
Statutes Involved	2
Statement	2
Argument	3
Conclusion	13

CITATIONS

Cases:

Albertson v. Federal Communications Commission, 87 U.S. App. D.C. 39, 182 F. 2d 397 (1950)	4
Beaumont Broadcasting Corporation, petitioner, v. Enterprise Company and Federal Communications Commission, No. 770, 351 U.S. 920, 76 S. Ct. 711	5
Braniff Airways, Inc. v. Civil Aeronautics Board, 79 U.S. App. D.C. 341, 147 F. 2d 152	10
W. S. Butterfield, Inc. v. Federal Communications Commission, ... U.S. App. D.C. ....., 237 F. 2d 552	4
Colorado Radio Corp. v. Federal Communications Commission, 73 App. D.C. 225, 118 F. 2d 24, 28	8
Enterprise Co. v. Federal Communications Commission, 97 U.S. App. D.C. 379, 231 F. 2d 708, cert. den. 351 U.S. 920, 76 S. Ct. 711 (1956)	4
Federal Broadcasting System, Inc. v. Federal Communications Commission, 96 U.S. App. D.C. 268, 255 F. 2d 560; cert. den. 350 U.S. 923, 76 S. Ct. 212 (1955)	10
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 60 S. Ct. 437 (1940)	4
Federal Radio Commission v. Nelson Bros. Co., 289 U.S. 266, 53 S. Ct. 627 (1933)	4
Fleming v. Federal Communications Commission, 96 U.S. App. D.C. 223, 225 F. 2d 523 (1955)	7
Ford Motor Co. v. National Labor Relations Board, 305 U.S. 373, 59 S. Ct. 306-307	11
Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 64 S. Ct. 1129 (1944)	9

PAGE

KFAB Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 160, 177 F. 2d 40 (1949)..... 9

McClatchy Broadcasting Co. v. Federal Communications Commission, ... U.S. App. D.C. ....., ... F. 2d ....., (Nos. 12,470 and 12,637, decided October 18, 1956, not yet reported) 6

National Labor Relations Board v. Jones & Laughlin Steel Corp., 331 U.S. 416, 67 S. Ct. 1274..... 11

O'Neill Broadcasting Co. v. Federal Communications Commission, ... U.S. App. D.C. ....., ... F. 2d..... (Nos. 13,113, 13,163, 13,164, decided December 13, 1956)..... 11

Statutes:

Communications Act of 1934, 48 Stat. 1064, *et seq.*, as amended, 66 Stat. 711 *et seq.*, 47 U.S.C. 151, *et seq*..... 11

Section 402 4

Section 402(b) 2, 3

Section 405 ..... 2, 4, 5, 10

Administrative Procedure Act, Sec. 10(e), 60 Stat. 243, 5 U.S.C. 1009..... 12

Radio Act of 1927, 44 Stat. 1169, Section 16..... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 658

SHREVEPORT TELEVISION COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

AND

SOUTHLAND TELEVISION COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT SOUTHLAND TELEVISION COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is unreported and is printed in full as Appendix A to the Petition at p. 1a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Court of Appeals upon appeal from a final decision of the Federal Communications Commission pur-

suant to 47 U.S.C. Section 402(b) may vacate the decision and remand without reversal for further consideration by the Commission of an event occurring during the pendency of the appeal which destroyed the basis of the Commission's decision.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in Appendix B, pp. la-7a, of the Petition, with the exception of Section 405 of the Communications Act of 1934, as amended (48 Stat. 1095, as amended, 47 U.S.C. 405), which is set forth as Appendix A hereto, *infra*, p. A-1-2.

STATEMENT

The mutually exclusive applications of Petitioner and Respondent Southland Television Company for construction permits for television Channel 12 in Shreveport, Louisiana, were heard in a comparative proceeding before a Commission Examiner, together with that of a third applicant which has since abandoned the case.

The Examiner's Initial Decision favoring the Petitioner was issued June 7, 1954, and the Commission's final decision, released May 20, 1955, also favored Petitioner. On June 20, 1955, Respondent Southland Television Company filed a Petition for Rehearing and Reconsideration. This Petition was denied on November 17, 1955, and on December 15, 1955, Respondent appealed to the Court of Appeals pursuant to 47 U.S.C. 402(b).[1]

While the case was pending in the Court of Appeals, the principal partner and proposed full-time manager of Peti-

[1] Contrary to Petitioner's statement that "in the meantime" it had constructed and put in operation such television station, interim television service for Shreveport on Channel 12 was provided during the pendency of the proceedings before the Commission by the joint construction and operation of a station by the three competing applicants under an agreement approved by the Commission.

tioner, Don George, died on June 5, 1956. The Court was apprised of Mr. George's death by the filing of the required suggestion of death by Petitioner, and on June 11, 1956, Respondent Southland Television Company moved the Court to remand the case to the Federal Communications Commission for further consideration to determine the effect of the death of Don George. Petitioner and Respondent Commission opposed the motion upon the ground that the Court of Appeals had no authority to remand without reversal. On October 2, 1956, the Court of Appeals entered a Per Curiam Order vacating the decision and remanding the case to the Commission ". . . with directions to reconsider its decision in the light of the circumstance that, by reason of the death of Mr. Don George, *the fact to which the Commission attached greatest weight no longer exists*". (Emphasis added.)

ARGUMENT

The United States Court of Appeals for the District of Columbia Circuit is given exclusive jurisdiction under 47 U.S.C. 402(b) of appeals taken from decisions of the Federal Communications Commission denying applications for radio or television facilities. Therefore, as noted by Petitioner, no conflict could arise among the various circuits from the decision of the Court below. Nor is the decision in conflict with any prior decisions of the Court of Appeals for the District of Columbia and none of the decisions of this Court cited by Petitioner is in direct conflict with the holding below.

It is the contention of the Petitioner that the decision of the Court below conflicts with the "basic scheme" of the Communications Act, with applicable decisions of this Court, and that it violates certain specific provisions of the statute which are said to govern the jurisdiction and pro-

cedure of the Court on appeal from decisions of the Federal Communications Commission. Petitioner ascribes to the Court of Appeals a plan to enlarge the scope of its powers of review under Section 402 of Title 47 U.S.C. to include the power to alter or revise Commission decisions appealed from, a power formerly conferred upon the Court by Section 16 of the Radio Act of 1927, 44 Stat. 1169, and deleted by an amendment adopted by the Congress by Act of July 1, 1930, 46 Stat. 844, c. 788. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S. Ct. 437 (1940); and *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 53 S. Ct. 627 (1933).

The effort of the Court of Appeals to enlarge its powers is said by Petitioner to have had its commencement in the case of *Albertson* v. *Federal Communications Commission*, 87 U.S. App. D.C. 39, 182 F. 2d 397 (1950), wherein the Court held that the Commission retained jurisdiction over a contested order during the period in which an appeal could be taken. Petitioner cites *W. S. Butterfield Inc.* v. *Federal Communications Commission*, ... U.S. App. D.C. ...., 237 F. 2d 552 wherein the Court refers to its holding in *Enterprise Co.* v. *Federal Communications Commission*, 97 U.S. App. D.C. 374, 231 F. 2d 708, cert. den. 351 U.S. 920, 76 S. Ct. 711 (1956), and contends that both Enterprise and Butterfield are further efforts by the Court below to stretch its powers of review.

In *Enterprise, supra*, the Court of Appeals held that an event occurring four months after the issuance of the Commission's decision, while not subject to inclusion as a ground for reconsideration by petition pursuant to Section 405 (47 U.S.C. 405), could, nevertheless, be reconsidered by the Commission, and added:

> "It is urged that the proceedings had lost a comparative character, and therefore that the Commission could

consider the agreement only under section 310(b), separate and apart from any further comparison of Beaumont's qualifications with those of Enterprise. This is another way of pressing the argument of finality. But, we repeat, the events in question, though they occurred subsequent to the August order and the petition for reconsideration, struck at the very basis which had been assigned by the Commission for its decision, and were disclosed at a time when the decision was still open for reconsideration. In these circumstances nothing in the language of sections 310(b) or 405 deprived the Commission of power to receive new evidence and to reconsider or redecide the case on a comparative basis. If this is not done the advantages of the comparative hearing are lost and its purposes frustrated. Section 310(b), important as it is in the total scheme of the Act, is no substitute for the comparative procedures available to applicants for the same permit. That section covers the situation where a transfer, assignment or other disposition of a construction permit or station license or any right thereunder, or a transfer of control of any corporation holding any such permit or license, is desired. Application must be made to the Commission, which must find that the public interest, convenience and necessity will be served thereby. Obviously these provisions do not come into play so long as a comparison between competing applicants is or should be active; and we hold that unless such comparison is kept active to take into account the new agreement here involved the rights of competing applicants are denied." 231 F. 2d 708, 712.

Petitioner neglected to point out that a writ of certiorari was sought to review the judgment of the Court of Appeals in *Enterprise, supra,* and that said petition was denied by this Court in April, 1956. See *Beaumont Broadcasting Corporation,* petitioner, v. *Enterprise Company* and *Federal Communications Commission,* No. 770, 351 U.S. 920, 76 S. Ct. 711.

In *Butterfield, supra,* WJR, the winning applicant in a three-way contest for a television station in Flint, Michigan, waited until ten days after denial by the Commission of petitions for rehearing by opposing applicants, Butterfield and Trebit, before filing an application for modification of construction permit. WJR then proposed to make changes in its programming, transmitter site, and to lease an existing one-story building for studios, thereby abandoning a proposed two-story building. The modifications proposed by WJR had been decided upon months earlier.

Butterfield and Trebit filed petitions to reopen the record because of the changed proposal of WJR, and upon denial of the petitions appeal was taken to the United States Court of Appeals for the District of Columbia.

On appeal, the Commission contended that *Enterprise, supra,* was not controlling because (1) the petitions to reopen were not filed until after denial of the petitions for rehearing, and (2) the changes were not of sufficient significance to warrant a change in the Commission's decision; that ". . . even if Enterprise requires consideration of the new events, there is no requirement of additional hearing, because the Commission has already examined the new facts and determined that they would not affect its decision." 237 F. 2d at 556.

The Court held that the changes in programming, location of transmitter site, and substantial changes in proposed studios, affected the foundation of the Commission's decision, and ordered the Commission to conduct further hearings and to reconsider its grant to WJR on the basis of the differences between WJR's original and modified proposals.[2]

---

[2] See *McClatchy Broadcasting Co.* v. *Federal Communications Commission,* ..... U.S. App. D.C. ....., ... F. 2d ....., Nos. 12,470 and 12,637, decided October 18, 1956, where the Commission permitted modifications in construction permit during pendency of appeal in United States Court of Appeals for the District of Columbia.

In addition to *Albertson*, *Enterprise*, and *Butterfield*, Petitioner finds fault with the decision of the Court below in *Fleming* v. *Federal Communications Commission*, 96 U.S. App. D.C. 223, 225 F. 2d 523 (1955). In the latter case, Anthony Wayne Broadcasting, a partnership composed of James R. Fleming and Paul V. McNutt, and Radio Fort Wayne, Inc., applied to the Commission for the same television channel in Fort Wayne, Indiana. After a comparative hearing, the examiner favored a grant to Anthony Wayne. The Commission reversed the examiner and made the grant to Radio Fort Wayne, Inc., on a finding that the obvious superiority of Anthony Wayne in certain areas ". . . was outweighed by the acquiescence of the individual partners, as Journal-Gazette stockholders, 'in certain advertising practices' which were deemed 'contrary to the public interest' ". 225 F. 2d 523 at 524.

The Commission's decision was appealed by Anthony Wayne and before the appeal was argued, Mr. Paul V. McNutt died. Suggestion of death having been filed, the Court requested supplemental briefs on the question of whether the case should be remanded to the Commission and the record reopened to consider the effect of Mr. McNutt's death. While conceding that the death of Paul McNutt would be relevant to a proper consideration of the case on remand if the Court reversed, the Commission argued that the case should not be remanded without a decision upon the issues presented by the appeal upon the existing record.

The Court was of the view that, inasmuch as the decision on appeal would ". . . turn on the question whether the Commission erred in giving controlling weight to the partnership's attitude toward and acquiescence in the imposition of a joint rate on advertisers", it was entitled to the benefit of the Commission's determination as to the effect of Mr.

McNutt's death before reaching a decision on whether to reverse or affirm. 225 F. 2d at 525-526.

Petitioner states that the holdings in *Butterfield, supra, Fleming, supra,* and the instant case indicate ". . . that the Court of Appeals does not believe the comparative phase of the administrative hearing is finally concluded by the Commission's decision and expiration of the period allowed for rehearing" but that "Finality must in its view await upon decision of the appeal"; that ". . . both the Commission's discretion (to reopen the record) and the Court's power to compel its exercise extend to all events occurring while an appeal from a Commission (decision) is pending." (Petition, pp. 8, 7.)

"All events" is an encompassing term. The cases cited by Petitioner give little support to its argument that the Court below is seeking to enlarge its power of review to alter and revise Commission decisions appealed from. The changed circumstances or new events occurring in the cases referred to by Petitioner go to the very foundation of the Commission's decisions. The mere suggestion of remote possibilities does not make an important Federal question. Indeed, Judge Edgerton, concurring in *Colorado Radio Corp.* v. *Federal Communications Commission,* 73 U.S. App. D.C. 225, 229, 118 F. 2d 24, 28, pointed out that the Commission ". . . cannot be required to put aside its other duties and hold a rehearing whenever a new fact arises which might *conceivably* lead to a new conclusion." (Emphasis added.)

In the instant case, however, Mr. George's presence as the principal partner and proposed day-to-day manager of Petitioner was of paramount importance in the formulation of the Commission's decision. It was the fact to which the Commission attached "greatest weight" in making its award. The death of Don George was not a matter which

could have been raised by petition for rehearing as it occurred more than thirty days after the date of the Commission's decision. His demise, however, destroyed the foundation of the Commission's decision and the Court below was entitled to the Commission's views as to the effect of his death, in the light of the significance the Commission attached to Mr. George's participation in awarding the franchise to Petitioner.

Petitioner's argument that administrative agencies have unlimited discretion to grant or deny petitions to reopen a record is not supported by the decisions cited. This Court held in *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 64 S. Ct. 1129 (1944) that " . . . rehearings were not matters of right, but were pleas to discretion", and that " . . . the discretion to be invoked was that of the body making the order, and not that of a reviewing body". 322 U.S. at 514-515, 64 S. Ct. at 1134-1135; and that if rehearing could be demanded ". . . as a matter of law because *some* new circumstance has arisen, *some* new trend has been observed, or *some* new fact discovered, there could be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening". 322 U.S. at 514, 64 S. Ct. at 1134 (emphasis added).

Admittedly, the occurrence of some new subordinate or collateral fact, related to but not of paramount importance in the formulation of the decision, would not be sufficient to warrant the reopening of a record, but nowhere in the opinion does this Court state that an administrative agency should not reconsider a decision in the light of a new happening or the occurrence of a new event which goes to the foundation of the decision.[3]

[3] The citation given by Petitioner at p. 14 of *KFAB Broadcasting Co.* v. *Federal Communications Commission* is incorrect. The correct citation is

In *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, 79 U.S. App. D.C. 341, 147 F. 2d 152, the United States Court of Appeals for the District of Columbia held that the Board had abused its discretion by its failure to reopen the record in a comparative proceeding to consider new facts as to the unavailability of a person, formerly president and principal stockholder, where the franchise had been awarded upon the qualifications and availability of such person. Don George, the principal partner and proposed day-to-day manager of Petitioner, whose ownership and participation was a factor of "greatest weight" in the Commission's decision, is no longer available to Petitioner.

It is the contention of Petitioner " . . . that the statutory scheme of judicial review contemplates solely review of the Commission's decision on the record before it and gives the Court of Appeals no authority to hold open during the pendency of an appeal the record the Commission has closed and which, under the statute governing the Commission, is no longer subject to reopening by the only method provided for that purpose — a petition to the Commission for rehearing" (Petition, p. 16). Petitioner argues that Section 405 (47 U.S.C. 405), in making the filing of a petition for rehearing a condition precedent to judicial review where the Commission has been afforded no opportunity to pass upon questions of fact or law relied upon in the appeal, shows " . . . the Act's intention that there shall not be reviewed on appeal facts other than those in the Commission record" (Petition, p. 16).

Section 405 means only that administrative remedies must first be exhausted before appeal; that where appellant

---

85 U.S. App. D.C. 160, 177 F. 2d 40 (1949). The case shown under the citation inadvertently used by Petitioner is *Federal Broadcasting System, Inc.* v. *Federal Communications Commission*, 96 U.S. App. D.C. 268, 225 F. 2d 560; cert. den. 350 U.S. 923, 76 S. Ct. 212 (1955). Respondent is unable to determine which, if either, case Petitioner intended to cite.

was not a party to the proceeding below, or the Commission was given no opportunity to pass on the point relied upon, the appeal will be dismissed. See *O'Neill Broadcasting Co.* v. *Federal Communications Commission*, ... U.S. App. D.C. ...., ... F. 2d ...., (Nos. 13,113, 13,163, 13,164, decided December 13, 1956).

Respondent Southland Television Company had no opportunity to raise before the Commission the matter of Mr. George's death prior to appeal. As was stated by this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 427-428, 67 S. Ct. 1274, 1281:

> ". . . the provision of Section 10(e) that 'no objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances,' quite obviously refers to objections that might have been but were not raised in the original proceeding before the Board. In this case, however, the deputization of the guards occurred after the Board had concluded its hearing and issued its order and after the court below had refused the first time to enforce the order. It was thus a matter which could not have been raised before the Board. And the failure of respondent to raise the then non-existent issue before the Board could not deprive the court below of power to consider the issue once it did come into existence."

No provision is found in the Communications Act of 1934, as amended, or Section 10(e) of the Administrative Procedure Act expressly authorizing remand under such circumstances. However, as this Court observed in *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. at 373, 59 S. Ct. at 306-307:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits,

> where justice demands that course in order that some defect may be supplied."

As was stated by Judge Bazelon, speaking for the Court of Appeals, in *Fleming, supra*:

> ". . . the Supreme Court's view that such procedure was proper rested not only on a statutory provision authorizing remand but also on the general equity powers which a court exercises in reviewing administrative action. Upon such a review, a court 'may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself, — to secure a just result with a minimum of technical requirements.' These principles are not limited to cases in which an agency has made inadequate findings. They extend to cases where, even without fault of the agency, the state of the record may preclude a 'just result.'" (Citing *Ford Motor Co., supra.*)

The action of the Court below was in accord with the provisions of Section 10(e) of the Administrative Procedure Act and the decisions of this Court. No important question of Communications law or of judicial review of administrative decisions is presented by the Petition.

The failure of the Solicitor General and the Commission to seek review of the order of the Court below manifests a rejection of Petitioner's contention that the ruling ". . . raises questions of central importance in the field of judicial review of administrative decisions," and "represents a bald usurpation by the Court of the Commission's discretion in respect of reopening" (Petition, pp. 4, 5). It must be presumed that if the decision below would hamstring the administrative process in the manner described by Petitioner, both the Solicitor General and the Commis-

sion would be seeking to overturn it. Parenthetically, it should be added that no petition for writ of certiorari was filed by the Solicitor General or the Commission in *Fleming, supra, Enterprise, supra,* or *Butterfield, supra.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

W. Ervin James
Counsel for Respondent
Southland Television
Company
1107 South Coast Building
Houston 2, Texas

January, 1957.

APPENDIX A

Communications Act of 1934, as amended, Section 405 (48 Stat. 1095, as amended, 47 U.S.C. 405).

Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which Section 402(a) applies, or within which an appeal must be taken under Section 402(b), shall be

computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed in any case, but any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

JAN 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 658

SHREVEPORT TELEVISION COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

SOUTHLAND TELEVISION COMPANY, *Respondents*

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

HENRY B. WEAVER, JR.
THOMAS M. COOLEY, II
Counsel for Petitioner

WEAVER AND GLASSIE
1225 19th Street, N. W.,
Washington, D. C.

January 30, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF AUTHORITIES

CASES: Page

Atchison, T. & S. F. R. Co. v. *U. S.*, 284 U.S. 248, 52 S.Ct. 146 (1932) 3

Braniff Airways, Inc. v. *Civil Aeronautics Board*, 79 U.S. App. D.C. 341, 147 F.2d 152 (1945) 3

Ford Motor Co. v. *National Labor Relations Board*, 305 U.S. 364, 59 S.Ct. 301 (1939) 2, 3

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 67 S.Ct. 1274 (1947) 2

STATUTES:

29 U.S.C. §§ 160(e), 160(f) (National Labor Relations Act) 2

47 U.S.C. § 402(b) (Communications Act, 1937) .. 2

ERRATA

The citation appearing at p. 14 of the petition herein: *KFAB Broadcasting Company* v. *Federal Communications Commission*, 96 U.S. App. D.C. 268, 225 F.2d 560; cert. den. 350 U.S. 923, 76 S.Ct. 212 (1955) was intended to read:

> *KFAB Broadcasting Company* v. *Federal Communications Commission*, 85 U.S. App. D.C. 160, 177 F.2d 40 (1949); *Federal Broadcasting System, Inc.* v. *Federal Communications Commission*, 96 U.S. App. D.C. 260, 268, 225 F.2d 560, 568; cert. den. 350 U.S. 923, 76 S.Ct. 212 (1955).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 658

SHREVEPORT TELEVISION COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

SOUTHLAND TELEVISION COMPANY, *Respondents*

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

The fundamental issue raised by the petition for a writ of certiorari herein is the scope of review properly open to the Court below upon appeal from a final decision in a comparative proceeding before an administrative agency. The irrelevance to this issue of the authorities upon which respondent Southland has felt constrained to rely is, perhaps, the best indication of how firm is the rule which the Court below violated.

Respondent's principal reliance on this issue seems to be on two cases arising out of petitions to enforce orders of the National Labor Relations Board.[1] Such cases present entirely different questions than do appeals from decisions of the Federal Communications Commission which have granted a Television station permit to one of competing applicants. Leaving aside the wholly unrelated duties imposed on the appellate courts by the statutes involved,[2] it is obvious that an enforcement proceeding presents problems quite unlike those involved in simple review of administrative action. When petitioned for enforcement, the appellate court is asked to apply in the present, and future, an affirmative order of the past which changed circumstances may render it wholly improper to enforce. As this Court points out in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (*supra*) at p. 422, "The order was a continuing command which may be effectuated in the future".

The power of a court of appeals to decline to enforce such an order in later developing circumstances which render enforcement inappropriate, however, is not a power to determine the correctness of the original administrative action on the basis of subsequent facts. As this Court said in *Jones and Laughlin* (*ibid*),

---

[1] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 67 S. Ct. 1274 (1947); *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 59 S. Ct. 301 (1939).

[2] With Section 402(b) of the Communications Act are to be compared the provisions of 10(e) and 10(f) of the Labor Board statute (29 U.S.C.A. §§ 160(e), (f)). *See* discussion of the latter statute at pp. 368-370 of 305 U.S., *Ford Motor Co.* v. *National Labor Relations Board* (*supra*).

> "But unless the order was valid when issued, there is no basis whatever for it and no court can decree its enforcement in the future. Hence its validity must be judged as of the time when it was issued . . ."

So also here, the validity of the Commission's decision must be judged as of the time when it was issued; and since the Court below had no other duty or authority than to judge that validity, its consideration of subsequent events is error.

The *Ford Motor Company* case, 305 U.S. 364 (*supra*), tends even less to support the lower Court's action in this case. There, after petitioning for enforcement, the Labor Board found, in a then recent Supreme Court decision, reason to believe that it had committed an error of law in conducting the proceedings leading to its own order. It therefore asked, and received, permission to withdraw the enforcement proceedings in order to review its own action. This Court held it was properly permitted to do so. Plainly this ruling has no tendency to support a compelled reopening of a self-executing, and executed, agency ruling because of facts later arising.

Finally, respondent seeks comfort in *Braniff Airways, Inc.* v. *Civil Aeronautics Board,* 79 U.S. App. D.C. 341, 147 F. 2d 152 (1945). In that case, one competing applicant moved the Board for rehearing, alleging that an important factor upon which the Board had relied no longer existed. So far as appears, this motion was timely. The appellate court held no more than that "in denying the motion for rehearing without opinion the Board abused its discretion". (Citing only *Atchison, T. & S. F. R. Co.* v. *U. S.,* 284

U.S. 248, 52 S. Ct. 146 (1932), a case since discredited. *See* petition herein, p. 12).

Obviously, finding an abuse of discretion in the denial of a timely motion for rehearing while the Board retains jurisdiction is quite different from compelling consideration of facts arising after the time for such a petition, and the agency's jurisdiction, has terminated.

It is therefore submitted that the cases cited by respondent have no bearing on the issue here presented and, if anything, strengthen petitioner's position that in undertaking to prolong the competitive status of an applicant finally rejected by the Commission, the Court of Appeals for the District of Columbia Circuit exceeded its jurisdiction.

In closing it should be noted that both the Court below and respondent Southland Television Company have seriously misconstrued the Commission's decision in making their respective assertions (Brief in Opposition, pp. 3, 8, 10) that Don George's ownership and participation was the fact to which the Commission attached "greatest weight" in making its award to petitioner.

The quoted words are clearly taken out of context. What the Commission said was that, in arriving at the conclusion that "substantial assurance exists that Shreveport Television's program commitments will be effectuated and community needs met", "we attach greatest weight to the fact that a 43% partner with a good record of local residence and civic activity will have full charge of the day-to-day operations of the station". (Joint Appendix, p. 191).

A fair reading of the finding that there was assurance that Shreveport would carry out its program proposals shows that the Commission intended to say only that it gave this factor greatest weight among other factors also given weight in support of that rather narrow conclusion (Joint Appendix, pp. 190, 191).

In contrast, the Commission affirmatively found the two other applicants unreliable (Joint Appendix, pp. 184-189); and it is clear that Mr. Don George's death could do nothing to remedy this fatal defect. His participation was one factor, the strongest among several having the same tendency, showing that Shreveport would carry out its program proposals. It was not and could not have been the fundamental and sole basis of the Commission decision to prefer Shreveport over two competitors whose unreliability was demonstrated.

It is therefore respectfully submitted that respondent Southland has shown no ground for denial of the petition for a writ of certiorari herein. On the contrary, the irrelevance of the cases cited by it to the issue herein presented tends only to show the clarity of the rule relied on by petitioner in seeking issuance of a writ.

HENRY B. WEAVER, JR.
THOMAS M. COOLEY, II
Counsel for Petitioner
Shreveport Television Company

WEAVER AND GLASSIE
1225 19th Street, N. W.,
Washington, D. C.

January 30, 1957